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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 636

JOHN C. BRUSWITZ AND EDWARD C. KOENKE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

No opinion was rendered by the District Court. The majority and concurring opinions of the United States Court of Appeals for the Second Circuit (Pet. 1a-8a) have not been reported.

JURISDICTION

The judgment of the Court of Appeals was entered January 22, 1955 (R. 2471) and a petition for rehearing was denied February 2, 1955 (R. 2478).

The petition for a writ of certiorari was filed March 3, 1955. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTIONS PRESENTED

1. Whether part of the testimony for the Government was false and, as such, knowingly used by the prosecutor.

2. Whether there was sufficient evidence that petitioners had attempted to evade taxes by having their secret commissions paid to sham corporations, and whether the trial court erred in its instructions on this aspect of the case.

3. Whether the trial court erred in refusing to exclude testimony of an Internal Revenue agent who was testifying as an expert and as to the findings of his investigation.

4. Whether the trial court erred in its instructions concerning taxability of secret commissions.

5. Whether the trial court erred in permitting testimony concerning unsuccessful attempts to obtain additional secret commissions.

6. Whether the instructions of the trial court unduly stressed inferences of guilt.

STATUTES INVOLVED

Internal Revenue Code of 1939:

SEC. 145. PENALTIES.

* * * * *

(b) *Failure to Collect and Pay Over Tax, or Attempt to Defeat or Evade Tax.*—Any person required under this chapter to collect,

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account for, and pay over any tax imposed by this chapter, who willfully fails to collect or truthfully account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, be fined not more than $10,000, or imprisoned for not more than five years, or both, together with the costs of prosecution.

* * * * *

(26 U. S. C. 1952 ed., Sec. 145.)

18 U. S. C.:

Sec. 371. *Conspiracy to commit offense or to defraud United States.*—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

STATEMENT

On January 22, 1953, separate 3-count indictments were filed against the petitioners in the United States District Court for the Southern Dis-

trict of New York. Petitioner Bruswitz was charged with wilful attempted evasion of his own income taxes and those of his wife for the years 1949, 1950 and 1951 in violation of Section 145(b) of the Internal Revenue Code. (R. 2434-2436.) Petitioner Koenke was similarly charged as to his own income taxes for the same years (R. 2445-2447.) Both petitioners, in a third indictment (R. 2456-2458), were charged with conspiring to commit the substantive offenses in violation of 18 U. S. C. 371. The indictments were consolidated for trial, and on July 7, 1953, the jury returned a verdict of guilty as to both petitioners on all counts. Each petitioner was sentenced to 3 years imprisonment and fined $5,000 on count I of the substantive indictment; imposition of sentence was suspended on counts II and III. On the conspiracy indictment, each petitioner was sentenced to imprisonment for 3 years, to run concurrently with the sentence imposed on the substantive indictment. (R. 2460-2461.) The Court of Appeals affirmed.

The evidence to support the verdict may be summarized as follows:

During the period covered by the offenses charged, petitioner Koenke was employed by Ore Steamship Corporation. His duties included obtaining bids and offers from various barge operators and placing work of his corporation with these various concerns. (R. 2102.) Bruswitz, during this period, was employed as operating man-

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ager of Calmar Steamship Corporation, in which capacity he controlled the negotiation of contracts for stevedoring. (R. 1910-1911, 2101-2103.) Both of these corporations are subsidiaries of the Bethlehem Steel Corporation.

During the years here involved, the petitioners received and divided between themselves about $215,000 in kickbacks or commercial bribes from companies which were doing business with the corporations employing petitioners. That petitioners received secret commissions but did not report them on their respective income tax returns was not disputed. These secret commissions were paid to petitioners in cash up to April 1951 and after that, were paid in checks to corporations formed by the petitioners. The cash payments were divided equally between the petitioners in accordance with a "gentleman's agreement." (R. 1729, 1733, 1995-2001.)

During the summer or fall of 1948, both petitioners met with Frank W. Nolan, president of Jarka Corporation, and broached the subject of their receiving a secret commission of two or three cents per ton on cargo handled by Jarka for each of petitioners' respective firms. (R. 834-838, 1555.) At a later meeting with petitioner Koenke, Nolan agreed to make payments to Koenke on a quarterly basis. (R. 840.) A similar arrangement was made with petitioner Bruswitz. (R. 841-842.) During 1949 and 1950 each petitioner rendered quarterly statements to Nolan and thereafter came separately

to his office to collect the cash payments. (R. 845-857.)

Petitioners claimed that the cash payments made to them during 1949 and 1950 were paid at Nolan's suggestion and that Nolan told them not to report the commissions on their income tax returns because Jarka would pay the taxes by not deducting the kickbacks in its corporate return. (R. 1555-1556.) Nolan, however, recalled no such conversation. (R. 1026.)

In 1949 and 1950 petitioners also received cash bribes from Bouchard Transportation Company. In February 1949, petitioner Koenke met with Morton S. Bouchard, president of this Company, at which time petitioner Koenke demanded $20,000 in return for helping him obtain a contract to transport fuel oil for Ore Steamship Corporation. (R. 315-316.) At a later meeting, Bouchard agreed to pay that amount (R. 323) and did pay petitioners in three installments: two payments of $7,500 in 1949 (R. 332, 338) and $5,000 in 1950 (R. 341). Petitioners, however, claimed that the kickbacks were volunteered by Bouchard and that it had been agreed that Bouchard would not treat the payments as business expenses. (R. 1623-1626.) Bouchard denied this and, in fact, did claim the kickbacks as a deductible expense. (R. 350, 630, 673.)

Neither petitioner kept any record of the cash payments received. (R. 1547, 1915.) Petitioner Koenke did not deposit his receipts in a bank, but kept them in a steel box at home. (R. 1702.)

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Petitioner Bruswitz kept the cash payments received by him in a metal box at home and also in a checking account. (R. 2016.)

In early 1951, Bouchard and Nolan refused to make further payments in cash and insisted that petitioners provide invoices to be paid by check. (R. 349, 913-915.) Accordingly, in April 1951, petitioners formed a corporation in New York. This corporation, Steveco, served no purpose other than to render false invoices to companies from whom Bruswitz and Koenke were receiving kickbacks. (R. 1761-1762, 1782-1784, 1986-1987, 2010, 2035, 2042-2044.) It was, in effect, merely a continuation of the cash payment arrangements. (R. 1830.) Secret commissions paid by Bouchard to Steveco were computed on the basis of the volume of oil carried by Bouchard for Ore Steamship Corporation and were paid at the rate of three cents per barrel. (R. 1762.) In July, 1951, petitioners formed a successor corporation in Michigan, Lakecan Trading Corporation. This corporation performed no services except to render invoices stating the amounts of secret commissions payable. (R. 1581-1586, 1782, 1783, 1866.) The corporation merely continued the original cash payments and the other arrangements, made at the time Steveco was formed, with the firms doing business with petitioners' employers. (R. 376, 928, 1614, 1783.) The method of computing the commissions payable remained the same. (R. 376, 1612-1616.)

During 1951, the four corporations set up by

Bruswitz and Koenke to receive the secret commissions were paid about $51,256.92 by Jarka and Bouchard. Two additional concerns, Detroit Marine Terminal, Inc., and Sheridan Transportation Company of Philadelphia, also paid secret commissions, totalling some $28,847.09 to the petitioners' corporations. (Ex. 113.) In addition to these payments made by check in 1951, Bouchard stated that in August 1951, he paid Bruswitz and Koenke $6,444.12 in cash. (R. 652.) The petitioners denied receiving this money. (R. 1657, 1953.)

During 1951, the firms paying the secret commissions claimed such payments as business expenses for tax purposes (R. 810, 1089) and the corporations reported the same as income. Bruswitz and Koenke, in their personal tax returns, reported the "salaries" which they received from the corporations. (R. 1609, 1959.)

In June 1951, petitioner Bruswitz demanded a lump sum payment of $5,000 plus a commission on cargo handled by Allen H. Jones, vice-president of Jones Stevedoring Company. (R. 1128-1129, 1135-1138.) Jones declined and notified petitioner's superior. (R. 1147.) Petitioners resigned from their respective positions in October 1951. (R. 1590-1592.)

ARGUMENT

1. Petitioners contend (Pet. 8-11) that some of the testimony for the Government was false, and they imply that the prosecutor must have known this. But on petitioners' own statement of this

issue it is clear that (1) it was a jury question whether the testimony involved was in fact true or false and (2) the implication of knowing use of perjury is, as the court below pointed out (Pet. App. 7a), wholly unfounded.

The claim here relates to the testimony of two Government witnesses, Mr. Bouchard and Miss Ranne, that a payment of $6,444.12 in cash had been made to petitioner Koenke in 1951. (R. 443-450, 604-605, 649-659, 718-726.) Koenke and Bruswitz denied receipt of the money (R. 1657, 1953.) Miss Ranne testified that Bouchard had withdrawn $6,444.12 in cash from the business at the time of the alleged payment. This was corroborated to some extent by invoices and checks. The checks had been drawn to cash. (R. 413, Ex. 40.) It was claimed that the invoices had been typed on plain white stationery at Bouchard's office under Miss Ranne's supervision. (R. 414, Ex. 41.) Samples from the typewriters in Bouchard's office were placed in evidence on the second day of trial, June 17. (R. 515, 517.) An expert witness testified for the defense on July 7, the last day of the trial, that the invoices in question could not have been typed with the typewriters in Bouchard's office. (R. 2077.) There was testimony, however, that one of the typewriters had been overhauled prior to the taking of the expert's samples. (R. 438.) And, as petitioners themselves point out (Pet. 9), witnesses Bouchard and Ranne insisted that the account they had given was accurate despite the contrary infer-

ence petitioners sought to establish from the typewriter evidence.

There was thus posed a simple issue of credibility, properly left for determination by the jury. *Glasser* v. *United States*, 315 U. S. 60; *United States* v. *Spadafora*, 200 F. 2d 140 (C. A. 7th); *Neal* v. *United States*, 114 F. 2d 1000 (C. A. 8th), certiorari denied, 312 U. S. 679. Nothing in the nature of this issue or in the character of the materials which bore on it precluded a jury finding that the witnesses for the prosecution had told the truth. What is still clearer is the decisive point that there was no evidence whatsoever that government counsel deemed this testimony false and knowingly employed it as such.

Petitioners are mistaken, too, in their contention (Pet. 10) that the trial court erred in refusing a request for an adjournment to permit them to obtain more typewriter samples. Whether to grant such an adjournment was within the court's sound discretion. Typewriter samples were first requested and introduced by petitioners on the second day of trial, June 17, and testimony that the typewriters had been overhauled had already been received. (R. 438.) Sufficient time was available up to July 7, when their expert testified (R. 2074), for petitioners to obtain such additional samples. Under the circumstances, there was no abuse of discretion.

2. Concurrent three-year sentences were imposed under the first, or 1949, count of the tax evasion

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indictment and under the conspiracy indictment. (R. 2460-2461.) Petitioners do not attack the sufficiency of the evidence in this respect. They do, however, contend (Pet. 2-3, 12-14) that there was no evidence of fraud under the third, or 1951, count of the tax evasion indictment as to which imposition of sentence was suspended. This was the year in which they formed four corporations to receive by check the payments which they had previously received personally in cash. They argue now (Pet. 12-19) that (a) there was insufficient evidence to warrant disregarding these corporations as mere "dummies," serving no purpose except to receive payments previously made directly to petitioners; (b) that there was, in any event, no "detriment to the revenue" since the four corporations reported the income they received and paid taxes on it, while petitioners paid taxes on salaries received from the corporations; and (c) that the instructions on this aspect of the case were erroneous. Apart from the fact, noted by the court below (Pet. App. 6a), that reversal on the count here involved would accomplish "nothing of practical value" for petitioners since they received no sentence under this count, the several contentions are without merit.

(a) There can be no doubt that the corporate form may be disregarded for tax purposes where it serves no business purpose, and particularly where, as was conceded here (R. 1174-1176, 1184-1185), it is wholly owned by the taxpayer. In *Moline Prop-*

erties v. *Commissioner*, 319 U .S. 436, 439, this Court said:

> In general, in matters relating to the revenue, the corporate form may be disregarded where it is a sham or unreal. In such situations the form is a bald and mischievous fiction.

See also *Higgins* v. *Smith*, 308 U. S. 473, 476-478; *Delaney* v. *Gardner*, 204 F. 2d 855, 861 (C. A. 1st); *National Investors Corp.* v. *Hoey*, 144 F. 2d 466 (C. A. 2d.)

Petitioners set up the corporation in 1951 simply because Bouchard and Nolan, refusing to continue cash payments, insisted that petitioners provide them with invoices to be paid by check. (*Supra*, p. 7.) The corporations served no other purpose than to render these invoices and receive the payments. The evidence showed, and petitioners admitted, that the 1951 payments were largely a continuation of the cash payments of previous years, and that they were computed, not, as petitioners now imply (Pet. 12), on the basis of valuable services provided by the corporations, but on the basis of the amount of business carried on between the payors of the kickbacks and petitioners' employers, the Bethlehem Steel Company and its subsidiaries (R. 1761-1762, 1782-1784, 1830, 1850-1851, 1986-1987, 2010, 2035, 2046). The corporations performed no services for the payors of the kickbacks; the payments resulted entirely from the amount of Bethlehem business which the payors

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obtained through the favoritism of petitioners; and the jury properly concluded that the corporations were mere conduits which served no business purpose.

(b) Petitioners argue that their use of sham corporations to receive their secret commissions resulted in no "detriment to the revenue" (Pet. 13-14) because the corporations reported the payments and paid tax thereon. The fallacies here are briefly stated. First, the evidence showed that the payments were in fact to petitioners and should have been reported accordingly. Just as in *United States* v. *Johnson,* 319 U. S. 503, an attempt to evade was made out where a defendant's actual income was ostensibly paid to and reported by sham partners, so here the offense could be shown by distributing petitioners' income among four sham corporations.

Moreover, even if the four corporations did pay income taxes, which does not clearly appear from the record, it was plain that these payments would not equal those petitioners should have made. By dividing the income among four purported taxpayers, the tax rate for the whole was improperly reduced. In addition, there were deductions for salaries paid to petitioners, for transfers of funds between the corporations, and for various other expenditures, all of which had the effect of reducing the total net income reported and all of which were unnecessary and unallowable if, as was shown, the corporations were mere shams. (R. 1174, 1207-1209, 1492-1493, 1609-1610, 1958-1960.)

Finally, the cash payment of $6,444.12 in August 1951 (*supra,* p. 8) was clearly not reported by any of the corporations or by petitioners, and on this the tax was clearly evaded (R. 649-658, 686-689, 722-727, 1544, 1791, 2055). This alone was sufficient to sustain the conviction and suspended sentence for the 1951 count.

(c) Petitioners' objections to the instructions relating to the corporations (Pet. 16-18) rest mainly on the fallacious notion that the jury could not be permitted to find the corporations sham and to disregard them for tax purposes. As we have observed (*supra,* pp. 11-13), there is no basis for doubting that the channeling of income to dummy corporations can be as much an act of wilful tax evasion as the keeping of false books or the destruction of records. Nor is there merit in the assertion that the jury was effectively precluded, by one sentence in the court's instructions (R. 2309), from considering the income taxes paid by the corporations. As the court below held (Pet. App. 5a-6a), this argument is not only "an afterthought," not properly raised by exception at the trial; but it is, in addition, unsubstantial on its merits, ignoring (1) the remainder of the charge, which as a whole stated fully and correctly the issues as to income and intent, and (2) the point, already noted, that tax payments by the sham corporations could not have absolved petitioners of their liabilities.

3. Petitioners assert (Pet. 20-22) that it was error not to strike statements of Revenue Agent Kovner that expenditures of the corporations had

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not been regarded by the investigators as ordinary and necessary business expenses. (R. 1492.) This witness was called by the Government for the purpose of making computations based on the evidence in the case. He was qualified as an expert by the Government (R. 1464-1465) and by petitioners' counsel as well (R. 1490-1491). Testimony of a technical and hypothetical character by this witness was clearly admissible. *United States* v. *Johnson,* 319 U. S. 503, 519. The testimony in question was of this character, and, as limited by the trial court's instructions, was clearly not prejudicial to petitioners.

This witness' opinion as to hypothetical questions was elicited by petitioners' counsel (R. 1482-1491) as well as by the prosecutor (R. 1463-1482). Following this line of questioning, petitioners' counsel inquired as to the witness' findings during his investigation and the witness was asked whether in his "opinion" the corporate books were "usual and adequate to the kind of transactions" carried on by the corporation (R. 1491) and whether the checks drawn by the corporations "purport to have been expenditures for corporate purposes," to which Agent Kovner responded, "We maintained that they were not ordinary and necessary expenses." It is this answer which petitioners contend was not responsive and should have been stricken. (R. 1492.) But petitioners' counsel had himself sought the agent's opinion and it was appropriate to respond with a statement as to how

these items had been treated in the course of the investigation.

This answer and a subsequent answer given to a question propounded by petitioners' counsel as to whether an accounting fee was an ordinary expense (R. 1493), if considered in context, were merely explanations of how these expenses were treated by the agent in the course of his investigation and not opinions on the law. As such it was not error to refuse to exclude them. See *Gendelman* v. *United States,* 191 F. 2d 993, 996-997 (C. A. 9th), certiorari denied, 342 U. S. 909. In view of the court's instruction (R. 1493) that this testimony was only the opinion of the witness, that it was not binding on the jury and did not prove the facts at issue, the testimony was not prejudicial. Cf. *Friedberg* v. *United States,* 348 U. S. 142, 145-146.

4. Among the contentions mentioned by petitioners as "additional questions raised" is the taxability of the kickbacks under *Commissioner* v. *Wilcox,* 327 U.S. 404. Recognizing the unsubstantiality of this argument since *Rutkin* v. *United States,* 343 U. S. 130,* they suggest that the trial court's instructions should have left to the jury whether this case came within *Wilcox,* which has been limited to its particular facts. The short answer is, as the court below held (Pet. App. 3a-4a), that the "situ-

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* And see *Marienfeld* v. *United States,* 214 F. 2d 632 (C.A. 8th), certiorari denied, 348 U.S. 865 (proceeds from sale of employer's products); *Briggs* v. *United States,* 214 F. 2d 699 (C.A. 4th), certiorari denied, 348 U.S. 864 (proceeds from fraudulent land sales by seller's agent).

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ation here is quite different" from the case of embezzled funds involved in *Wilcox*.

5. The next "additional question" (Pet. 23) is whether the trial court erred in permitting testimony (R. 1136-1138) of unsuccessful attempts by petitioners to obtain secret commmissions similar to those on which they were alleged to have evaded taxes. However, petitioners asserted at the trial that the secret commissions were volunteered (R. 1556, 1623), and sought to show that they understood that the taxes on these sums were to be paid for them (R. 1026-1027, 1556, 1625). Evidence that such kickbacks were deliberately demanded, sometimes unsuccessfully, was clearly relevant to show that the kickbacks were not given to petitioners as tax-paid gratuities. It showed a course of business from which the jury could infer that failure to pay taxes on the resulting income was not based merely upon mistake as to the character of the receipts but was a wilful attempt to evade taxes.

6. Finally, citing two pages of the record, petitioners assert (Pet. 23) that the trial judge's charge "stress[ed] every inference of guilt, both overtly and by posing weighted questions, while neglecting inferences favorable to innocence * * *." The charge as a whole amply refutes this broadside.

Equally without merit is the more specific assertion under this last point that the trial court misquoted portions of the testimony. Petitioners themselves acknowledge (Pet. 23) that their differing version of the evidence was brought to the

jury's attention by the trial judge. As they further concede, the court emphasized repeatedly to the jury that their view of the evidence was controlling, an instruction he gave in his main charge (R. 2347), at the time his alleged errors were noted (R. 2362), and again when the jury requested that a portion of the charge he read to them (R. 2370). These instructions amply insured that the jurors would find the facts from the evidence for themselves. See *Bell* v. *United States*, 185 F. 2d 302, 311 (C. A. 4th), certiorari denied, 340 U. S. 930.

CONCLUSION

The decision of the court below is correct and presents no conflict. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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APRIL 1955.

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